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CHARLES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 700

JOHN H. PAGE, TRUSTEE,

Petitioner,

versus

ARKANSAS NATURAL GAS CORPORATION,

Respondent.

PETITION FOR CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF.

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ARKANSAS NATURAL GAS CORPORATION,

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PETITION FOR CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF.

To the Honorable, the Justices of the Supreme Court of the United States:

The petition of John H. Page, Trustee for Mike Lyvers Syndicate, respectfully shows as follows:

I.

This is a suit in equity, originally filed in the Chancery Court of Union County, Arkansas, against the Natural Gas & Fuel Corporation. On application of the defendant the case was removed to the United States District Court

for the Western District of Arkansas. In that court defendant filed a motion to dismiss for no cause of action, which was sustained by the district court. *35 Fed. (2) 462.* But on appeal, the Circuit Court of Appeals for the Eighth Circuit, Judges Van Valkenburgh, Cotterral, and District Judge Scott sitting, reversed the judgment, remanding the case for trial in accordance with its opinion. *35 Fed. (2) 462.* The Arkansas Natural Gas Corporation was then substituted as defendant and the case was tried, resulting in a judgment for defendant (R, 92-119). From this judgment plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit. By that court, Judges Kenyon, Booth, and District Judge Dewey sitting, the judgment was affirmed on October 5, 1931 (R. 201-224), and motion for rehearing was denied December 9, 1931 (R. 232). This application for writ of certiorari is being prosecuted from that judgment.

II.

Statement of Facts.

There is no disputed fact in this case; only questions of law are present.

The Harry Morris Guaranteed Gusher Syndicate No. 3, a common law trust, with Harry Morris trustee, was adjudicated a bankrupt December 24, 1923 (R. 187). H. M. Barney became trustee January 29, 1924, having previously served as receiver. He immediately took steps to sell property as belonging to the bankrupt, the sale being fixed for February 8, 1924 (R. 31). An undeveloped oil lease on the NW¼ of NW¼ of Section 9 Township 16 South, Range 15 West, Union County, Arkansas, called

the Bilyeu lease, owned by Mike Lyvers Syndicate, a separate and distinct common law trust, was included in the property to be sold. The bankrupt had neither title to nor possession of this lease.

On February 7, 1924, a petition was filed by Mike Lyvers, an individual, to prevent this sale and, as an individual, he claimed the Bilyeu lease as his own. The trustee of the bankrupt had possession of certain producing property claimed by Mike Lyvers, but he only claimed to have posted a placard on the surface of the Bilyeu lease, which lease was in the possession of the owner, Bilyeu, and the placard did not describe the lease in any way, but merely stated that the property was in the custody of the district court, and was signed by the receiver in bankruptcy.

The sale did not take place February 8, 1924, and on March 6, 1924, the referee in bankruptcy issued a summary order after Mike Lyvers moved to dismiss his intervention, and passed on the intervention and also a petition of the bankrupt's trustee to have Lyvers execute conveyances to him, and entered the following order:

> "It is therefore ordered that the interventions of Otto L. Morris and Harold I. (Mike) Lyvers be and the same are hereby denied and the title to the properties claimed vested in the trustee in bankruptcy of this estate and each is hereby ordered to execute conveyances transferring the legal title to all said properties to the trustee in bankruptcy, H. M. Barney." Signed, G. G. Pope, Referee in Bankruptcy. (R. 33).

Mike Lyvers filed a petition for review, alleging, among other things, that he had learned that the property

did not belong to him but to the Mike Lyvers Syndicate (R. 35-39). Judge Frank A. Youmans of the district court considered the petition for review and entered the following order, which we quote in full (R. 34-35):

> "On this 23rd day of April, 1924, comes on to be considered the petition of Mike Lyvers for review of the order of the Referee herein requiring said Mike Lyvers to execute to H. M. Barney as Trustee of said bankrupt estate a quit claim deed conveying to said trustee all the properties claimed by the said Mike Lyvers in his intervention.
>
> "It appears from the testimony and the record
>
> "1. That the said Mike Lyvers filed his intervention before the Referee claiming the property described therein as his own personal property.
>
> "2. That H. M. Barney as Trustee for the Bankrupt estate filed his response to the intervention of Mike Lyvers and denied the allegations of ownership of Mike Lyvers.
>
> "3. That on the same day the said H. M. Barney as trustee of said bankrupt estate filed a petition in the same case for a summary order against Mike Lyvers requiring him to convey to the Trustee all the properties claimed by said Mike Lyvers in his intervention.
>
> "4. That after the filing of said petition for a summary order Mike Lyvers moved to dismiss his intervention which was denied by the Referee.
>
> "5. That the Referee then proceeded to hear the testimony as to the ownership of the property and upon the testimony found that said Mike Lyvers was not the owner thereof, but that it belonged to the bankrupt estate.

"6. The only point involved is whether the Referee had jurisdiction to make the order upon said Mike Lyvers.

"The court finds as a matter of law that the said Referee did have such jurisdiction. It is therefore by the court considered, ordered and adjudged that the order of the Referee requiring Mike Lyvers to convey to H. M. Barney, Trustee of the Harry Morris Guaranteed Gusher Syndicate No. 3, Bankrupt, by a quit claim deed for all of the property described in the intervention of said Mike Lyvers be affirmed.

"Frank A. Youmans,
Judge."

Some time after this order Barney, trustee in bankruptcy, procured a quit claim deed from Mike Lyvers signed by him in three capacities, namely, as an individual, as trustee for Mike Lyvers Syndicate and as trustee for another distinct syndicate, entitled "Mike Lyvers Trustee" (R. 30). This last is in no wise involved in this litigation. The Mike Lyvers Syndicate had sold to subscribers units or shares to the value of $144,000.00 (R. 126). Mike Lyvers Trustee likewise had a large number of unitholders.

Mike Lyvers, whose full name is Harold I. Lyvers, together with Harry Morris, trustee of the Morris Syndicate, had been indicted on December 12, 1923, for conspiracy to defraud the unitholders of Mike Lyvers Syndicate (R. 132), and on October 13, 1924, when he made the deed to Barney above noted, Lyvers was expecting sentence on a plea of guilty (R. 145). He was subsequently fined (R. 117). He made affidavit, as shown by Exhibit-D to the answer, that he had signed the quit claim deed under fear of punishment for contempt (R. 72).

On January 23, 1925, H. M. Barney, Trustee, contracted to sell for $125,000.00 all the property then remaining in the Morris Syndicate, to the Natural Gas & Petroleum Corporation. He included the Bilyeu lease. There was a stipulation in the contract that no deduction would be made in the price for property having no commercial value (R. 145). At this time the Bilyeu lease was burdened with an oil obligation payable out of first production, of $32,000.00, and had no value (R. 146, 186). Shortly thereafter an oil field developed around the Bilyeu lease and values were greatly enhanced (R. 186, 187). On February 20, 1925, at the instance of Jeff Davis, attorney for the purchaser, a correction deed was given by Mike Lyvers, under the same signatures (R. 150). For the execution of this deed Mike Lyvers received $600.00 personally, which is described in an affidavit attached to Exhibit-D of the answer, and made a part of defendant's answer in this case (R. 72). Jeff Davis was attorney for Natural Gas & Petroleum Corporation, Natural Gas & Fuel Corporation, and Arkansas Natural Gas Corporation.

Suit was brought by John H. Page, Trustee of Mike Lyvers Syndicate, in succession to Mike Lyvers, in the Eastern District of Arkansas, the domicile of Page, in January 1926 (R. 123). The case, in April 1927 (R. 123), was dismissed for want of jurisdiction. The allegations of the amended complaint (R. 46-48) show all the steps taken by Page, Trustee.

The present suit was then filed in Union County Chancery Court of Arkansas on December 20, 1927, and removed by the defendant, Natural Gas & Fuel Corporation, to the United States District Court for the Western

District of Arkansas (R. 15). Motion to dismiss for no cause of action was sustained by Judge Youmans of that court. This judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit, the opinion being published in *35 Fed. (2) 462, Page v. Natural Gas & Fuel Corporation*, and the case was remanded in the following language:

> "The decree of the district court is thereby reversed with direction to allow the plaintiffs to amend their bill if so advised within a reasonable time, and for further proceedings consistent with this opinion." *35 Fed. (2) 465.*

The Arkansas Natural Gas Corporation was substituted as defendant and it filed the answer (R. 49). The case was then heard by Judge Youmans and again decided by him against the plaintiff (R. 92-119).

Appealed to the Circuit Court of Appeals for the Eighth Circuit, with a different personnel, the said court affirmed the decision of Judge Youmans (R. 201), holding that there was a merger of the Morris and Lyvers Syndicates,—not because any legal forms had been pursued, but because the Morris Syndicate had assumed control of all the producing properties of the Lyvers Syndicate and had used all of the revenues, as also did the trustee in bankruptcy, and nothing was paid out for the Lyvers Syndicate except one rental of $40.00 paid during the bankruptcy proceeding, and all of the time that the Morris Syndicate was using the funds of the Lyvers Syndicate, the expenses due by the Lyvers Syndicate were paid to the Morris Syndicate and others by the Lyvers Syndicate (R. 188-191).

The sale of property by the bankrupt's trustee netted $6,000.00 more than all debts and costs (R. 154), but the same was not paid to the bankrupt, but distributed among various unitholders of various syndicates, in a dividend of ¼th of 1% (R. 148).

A full statement of facts is found in *35 Fed. (2) 462, 463*, and in the Advance Sheets of *53 Fed. (2) 27*, and R. 201, *et seq.*, to which reference is made.

The Court of Appeals on the second appeal, while recognizing the law of the case, declined to apply it because of the fact that in the proceedings before the referee above referred to, a response by the trustee in bankruptcy and a petition for a summary order on Mike Lyvers to execute quit claim deeds were offered in evidence by the defendant on the trial, and were not included in the exhibits attached to the bill of complaint which had been considered on the first appeal, although the substance of these two instruments, which were Exhibits "B" and "C" attached to defendant's answer (R. 59-60), were set forth in the affirming opinion of Judge Youmans, and are shown in substance in the finding of the referee in bankruptcy. No reference is made to Mike Lyvers Syndicate in either instrument, Mike Lyvers the individual alone being named, and before the hearing Mike Lyvers moved to dismiss his intervention.

The Circuit Court of Appeals on the second appeal also said that it was not shown on the first appeal that Mike Lyvers individually had no title, and this was said although the bill of complaint was based in the titles to the Mike Lyvers Syndicate, considered on the first appeal, and being Exhibits "B" and "C" attached to the bill of complaint (R. 26-28).

III.

The Issues in the Case.

These may be summarized briefly: The Morris Syndicate went into bankruptcy and the trustee in bankruptcy sold a lease belonging to the Mike Lyvers Syndicate, a separate and distinct entity. The purchaser had full notice that the property was the property of the Mike Lyvers Syndicate.

The Circuit Court of Appeals of the Eighth Circuit decided a question of Federal law in two directly conflicting ways: first, on the motion to dismiss for no cause of action, the Court held that a referee in bankruptcy could not summarily adjudicate title against the trustee of a syndicate in a proceeding to which said trustee was not a party in his representative capacity but had appeared as an individual seeking to stop the sale of an intangible, to-wit, an undeveloped oil lease; while the second decision held that the appearance of the individual, inasmuch as the said individual did not own the property individually, was in fact an appearance in a representative capacity, and that the decision of the referee in ordering the individual to make a quitclaim deed to the trustee of the bankrupt was *res adjudicata* against the syndicate of which he was trustee. In the second decision the Court also held that the petition of the trustee in bankruptcy filed after the date on which the sale was to take place, asking that the individual be ordered to execute a quitclaim deed, although the individual petitioner moved to withdraw his original petition, would and did serve as authority to the referee to adjudicate title against the individual petitioner, which

adjudication was final against the syndicate, and the additional evidence was sufficient to justify the Court in disregarding the original decision on appeal as the law of the case.

Another question of Federal law was involved in the holding that the possession of an intangible, to-wit, an undeveloped oil lease which had never vested in the bankrupt itself and never been possessed by said bankrupt, nevertheless could be taken possession of by the trustee in bankruptcy by merely going on the surface estate which belonged to a third party and posting notices thereon that the property was held by the court in bankruptcy, without specifically describing the property, or describing the property which was so held as an undeveloped mineral lease.

Another question of Federal law was involved in the holding that when the referee in bankruptcy found in the summary proceeding that the individual petitioner had no title as an individual, he had a right to determine and adjudicate the title against the individual which would be final against the syndicate, and need not instruct the trustee in bankruptcy to bring a plenary action but could determine title in the summary proceeding.

In addition to the above, a question of general law as well as of federal law was involved when the Court held that where the producing properties of two independent common law trusts, called syndicates, separately organized with separate trustees, were operated by one of these syndicates but the expenses were prorated between the two and the operating syndicate appropriated all the revenues

of the other syndicate, nevertheless, although no legal proceedings had been taken, there was a merger of the two syndicates, which merger vested in the operating syndicate an undeveloped oil lease which was owned of record by the other syndicate, and when the operating syndicate was adjudicated bankrupt the receiver of the bankrupt, who afterwards became trustee, had a right as receiver to take possession of such undeveloped oil lease, and as trustee to sell same as the property of the bankrupt under an order of a referee in a summary proceeding.

A question of Federal law was involved in the Court's holding that a quit claim deed, signed by a person as trustee for a syndicate, bound the syndicate under an order of a referee in a summary proceeding, where the syndicate had never been in court,—the deed having been signed by a trustee who had plead guilty to defrauding unitholders.

The opinion of the Court on the second appeal was contrary to the decisions of the Supreme Court of the United States in *May v. Henderson, 268 U. S. 111*, and of the Circuit Court of Appeals for the First Circuit in *Plymouth County Trust Company v. MacDonald, 53 Fed. (2) 827.*

IV.

Reasons for Granting Petition.

The writ of certiorari should be granted to review the action of the Circuit Court of Appeals for the Eighth Circuit which erroneously held that Mike Lyvers Syndicate was represented in the summary proceedings before

the referee in bankruptcy because Mike Lyvers had appeared therein as an individual for the sole purpose of having prevented a threatened sale of properties claimed by Lyvers as individually his; to review the same Court's holding that the referee was not bound to instruct the trustee to bring a plenary suit for the purpose of determining title as between Harry Morris Guaranteed Gusher Syndicate No. 3 and Mike Lyvers Syndicate, but on the contrary, the referee had the right summarily to adjudicate the title, and this adjudication constituted *res adjudicata* against the Mike Lyvers Syndicate; and the Court's erroneous holding that the order of the referee that Mike Lyvers execute a quitclaim deed to the trustee in bankruptcy of the Harry Morris Guaranteed Gusher Syndicate No. 3 meant that Mike Lyvers was ordered to execute such a deed in the name of Mike Lyvers Syndicate; also, the erroneous holding of the Court that possession could be taken by the trustee of bankruptcy of property that had never belonged to the bankrupt by purchase or otherwise and was never in his possession either actually or constructively, but in possession of Mike Lyvers Syndicate, and because even if Mike Lyvers were the agent for the bankrupt Morris Syndicate and the finding of the referee and his order is final against Lyvers, it could not be final against the Mike Lyvers Syndicate because, if Lyvers were the agent of the Morris Syndicate, his duty as trustee of the Mike Lyvers Syndicate could not be ignored and a decision could not be rendered so as to preclude the right of the Mike Lyvers Syndicate to claim property which its unfaithful trustee had made no effort to protect for the Mike Lyvers Syndicate against the Morris Syndicate; and the Court's erroneous holding that possession could

be taken of an intangible oil lease by posting a notice above the surface of the ground covered by the oil lease, when the surface was in the possession not of the bankrupt but of another person, and when the notice did not definitely describe the property taken in possession as being an undeveloped oil lease; also, the Court's erroneous holding that the decision rendered on the previous hearing in the same case by itself (Circuit Court of Appeals of the 8th Circuit) on a motion to dismiss for no cause of action, where the Court considered exhibits attached to the bill of complaint on the first appeal and remanded the case to be tried in accordance with its opinion was not the law of the case where no additional evidence had been offered in the case and the Court erroneously held that the filing by the defendant of two pleadings which had been described in the exhibits attached to the bill of complaint was sufficient additional evidence to set aside the law of the case; and, the Court's erroneous holding that the law of the case did not apply because Mike Lyvers had alleged himself to be the individual owner of an oil lease and the evidence showed that he had never been the individual owner of the oil lease, although the entire contention of the plaintiff as shown by the bill of complaint and the exhibits attached of deeds to Mike Lyvers Syndicate was based on the theory that Mike Lyvers as an individual never owned the property and Mike Lyvers Syndicate alone was the owner of the oil lease; also the Court's erroneous holding that the property of a third person could be sold by a trustee in bankruptcy on the order of a referee in bankruptcy upon a petition filed in a summary proceeding to stop a sale, where the petition was withdrawn after the date on which the sale was to take place had passed, and

the referee in spite of this fact held a hearing on a petition filed by the trustee of the bankrupt to have the individual who opposed the sale ordered to execute a quit-claim deed to the trustee of the bankrupt; also, the Court's erroneous holding that where one common law trust, called a syndicate, operated the producing properties of another common law trust, but collected the pro rata of expense from such other common law trust, despite which fact the revenues were appropriated by the operating syndicate and no legal proceedings were taken to consolidate the same, nevertheless a merger took place which authorized the sale by the trustee in bankruptcy of the syndicate which had assumed control of an undeveloped, nonproducing oil lease owned by the other syndicate, which had been deprived of its revenues and had received no benefit except the payment of a small rental on an undeveloped oil lease.

Petitioners herewith present, as part of this petition, transcript of the record in the Eighth Circuit Court of Appeals.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Eighth Circuit, commanding that court to certify and send to this court for its review and determination; on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9102 in equity, John H. Page, Trustee, etc., Appellant, vs. Arkansas Natural Gas Corporation, Appellee, and that said judgment of the United States Circuit

Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

FRANK J. LOONEY,
JUDSON M. GRIMMET,
YANDELL BOATNER,
Attorneys for Petitioners.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well-founded and that the case is one in which the prayer of the petition should be granted by this Court.

FRANK J. LOONEY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The judgment of the Circuit Court of Appeals was entered October 5, 1931 (R. 201). Petition for rehearing was denied December 9, 1931 (R. 232). The jurisdiction of this Court is invoked under *Section 248 of the Judicial Code*, as amended by act of February 13, 1925, C. 229; *43 Statutes 936, 938; 28 U.S.C.A. Sec. 34.* The facts have been fully set out in the petition for certiorari, pages 1 to 15.

Assignment of Errors.

1. The Court erred in holding that a referee in bankruptcy had jurisdiction to determine title to an undeveloped oil lease in a summary proceeding, notwithstanding adverse claim, and that he was not required after finding claim was more than colorable to remit trustee in bankruptcy to plenary action.

2. The Court erred in holding that an individual asserting an adverse claim of title to such a lease thereby conferred jurisdiction on the referee in bankruptcy in a summary proceeding to adjudicate title to same as against the individual and against a common law trust of which such person was the trustee.

3. The Court erred in holding that a trustee in bankruptcy could take constructive possession of an undeveloped oil lease and subject same to the jurisdiction of a referee in bankruptcy when the bankrupt never had any title to said lease nor any possession, either constructive or actual.

4. The Court erred in holding that an individual who had asserted title to an undeveloped oil lease in a summary proceeding before a referee in bankruptcy to stop a sale of said lease could not withdraw such opposition before a hearing was had because the trustee in bankruptcy had filed a petition to require such person to execute a quit-claim deed to him of such lease and the referee was ready to have a hearing and grant such an order.

5. The Court erred in holding that the trustee of a syndicate acting under a trust declaration which authorized trustee to terminate trust by merger in any manner could effect merger by turning over control to persons operating another syndicate, and by allowing them to intermingle property of two trusts and confuse their affairs but without any legal proceedings whatsoever.

ARGUMENT.

The Circuit Court of Appeals for the Eighth Circuit considered on an appeal from a judgment of the district court sustaining a motion to dismiss for no cause of action, a bill of complaint with eight exhibits attached. [6] These exhibits, "A" to "G", are shown consecutively in the record, pages 16 to 43.

The Circuit Court of Appeals in its opinion reported in *35 Fed. (2) 462*, under the name of *Page v. Natural Gas & Fuel Corporation*, said, in reference to the bill and exhibits:

> "The appeal presents four main questions: (1) whether the order of the referee upon Mike Lyvers as an individual to execute the deed bound him to do that as trustee of the syndicate; (2)

whether his deed as trustee conveyed the title to the lease; (3) whether the defendant, the fuel corporation, was an innocent purchaser of the lease; (4) whether the plaintiffs were guilty of laches barring this suit. We are constrained to hold that the first three questions must be answered in the negative for sound and sufficient reasons. The last requires no absolute answer, in view of proposed amendment to the bill."

The Arkansas Natural Gas Corporation, having been substituted as defendant, filed an answer and exhibits, among which were: Exhibit-B, Response of H. M. Barney, Trustee to intervention of Mike Lyvers (R. 59); Exhibit-C, Petition of H. M. Barney, Trustee, to require Mike Lyvers to execute certain quitclaim deeds (R. 60); Exhibit-D, Petition of intervention of L. J. Zug, et al. (R. 62), to which was attached an exhibit (R. 71, 72).

On the second appeal the Circuit Court of Appeals, in its opinion shown in the transcript of record pages 201 to 224, on page 207, said:

"The rule of the law of the case is of course recognized by this court,"

and later on, states:

"The evidence introduced on the present trial shows that Lyvers never held the property in question as an individual or in any capacity except as trustee, which throws a different light upon his appearance in the intervention proceeding. At the present trial the response and the petition for summary order filed in the intervention was introduced. That was not in the former trial. The District Court in its opinion stated, 'It appears from the testimony that the only title Lyvers had was that acquired in the two conveyances to him by Otto L.

> Morris.' Further, 'The testimony clearly shows that Barney as Trustee in Bankruptcy had no possession of any property belonging to Mike Lyvers individually.' These statements are justified by the evidence. It is apparent that the evidence introduced here makes a case materially different from that appearing on the face of the complaint, therefore as to the questions we propose to discuss we are in our judgment not bound by the former decision."

We note that the Court holds, first, that Exhibit-B attached to the answer is new evidence; second, that Exhibit-C attached to the answer is new evidence; and third, that Mike Lyvers as an individual had no title.

We first call the Court's attention to the third proposition, and the statement quoted from the district court, "It appears from the testimony that the only title Lyvers had was that acquired from two conveyances to him by Otto L. Morris." These two conveyances are Exhibits "B" and "C" attached to the bill of complaint. Therefore, no argument is needed to show that the Court in the first appeal had before it evidence that the only title which was of record in this case was to Mike Lyvers Syndicate and there is nothing new in the way of evidence on this point, when the Court concludes from these two exhibits the very fact that the case is based on, namely, that Mike Lyvers as an individual had no title to convey, and that the Mike Lyvers Syndicate had title, as is shown by the findings of fact of the district judge in these words, "The record title to the Bilyeu lease was in the Mike Lyvers Syndicate, Mike Lyvers, Trustee." (R. 120). The two Morris deeds to Mike Lyvers Syndicate were conveyed in accordance with Article 15 of the Trust Articles (R. 23).

We next take up Exhibit-B attached to the answer. In this response of the trustee of the bankrupt reference is made, first, to the "intervention of the said Mike Lyvers;" second, the response denies that "Mike Lyvers is the owner of said oil and gas lease or has any interest therein whatsoever" (R. 59). Not a suggestion is made that Mike Lyvers Syndicate was not the owner of the leases, or that Mike Lyvers Syndicate is impleaded in any way.

In Exhibit-C of the petition for summary order requiring Mike Lyvers to execute quitclaim deed, an allegation is made (referring to the Bilyeu lease) "This lease is in Union County Arkansas and is owned by Mike Lyvers," and later is this allegation:

> "Your petitioner shows that said oil and gas leases were purchased with the properties, moneys and assets of said bankrupt estate, and that said leases were taken in the name of Mike Lyvers, but that the said Mike Lyvers only took and held as trustee for the benefit of said trust estate, the bankrupt herein."

The prayer is that Mike Lyvers be ordered to execute the deed and, in default thereof, to show cause why he should not be committed for contempt (R. 61, 62).

The Referee in Bankruptcy on March 6, 1924 (R. 32-33) entered the following order:

> "It is therefore ordered that the interventions of Otto L. Morris and Harold I. (Mike) Lyvers, be and the same are hereby denied and the title to the properties claimed vested in the trustee in bankruptcy of this estate, and each is hereby

> ordered to execute conveyances transferring the legal title of all said properties to the trustee in bankruptcy, H. M. Barney."

It will be noted that no mention of Mike Lyvers Syndicate is made in the petition for summary order filed by the trustee of the bankrupt or in the order of the referee, and in the order of the referee, Harold I. (Mike) Lyvers is ordered to execute conveyances, showing that it was the deliberate purpose of the referee to have an individual whose Christian name was Harold I. Lyvers execute the conveyances.

These two instruments are the "additional evidence" so-called by the Circuit Court of Appeals on the second appeal. In the first place, they were pleadings of the defendant; in the second place, they clearly disclose that Mike Lyvers Syndicate was never impleaded. The position we take is further strengthened by the fact that in Exhibit-F to the bill of complaint previously referred to, there are two distinct instruments. The first is the judgment of affirmance of Judge Frank A. Youmans, of the Western District of Arkansas, quoted in full in the petition, *supra*, wherein he distinctly described the exhibits "B" and "C".

The district judge found that Mike Lyvers claimed the property as his own "personal" property; and then stated the substance of the response and petition of H. M. Barney, trustee of the bankrupt. This Exhibit-F was before the Circuit Court of Appeals on the first appeal.

In addition thereto, the second part of Exhibit-F is the petition for review filed by Mike Lyvers individ-

ually. In the petition for review Mike Lyvers directs attention to the fact that the property was bought with the funds of the Mike Lyvers Syndicate, a trust estate, and further calls attention to the fact that the Mike Lyvers Syndicate has not been made a party to the proceeding (R. 36, 37), and also makes the emphatic statement that, "Mike Lyvers was without title." (R. 39). This exhibit was before the Court on first appeal.

The district judge aforementioned did not consider this question whatsoever, but said:

> "The only point involved is whether the referee had jurisdiction to make the order upon said Mike Lyvers." (R. 34).

On the first appeal the Circuit Court of Appeals said:

> "We do not inquire collaterally into the merits of these proceedings, passing the serious contention that the referee had no jurisdiction to make the summary order on Lyvers. See May vs. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870; Harrison vs. Chamberlin, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897. Aside from that it is clear that the order on him as an individual had no force whatever upon him as trustee of the Mike Lyvers Syndicate. It was not an adjudication against him as trustee and does not estop the plaintiff as successor trustee to maintain this bill. 34 C. J. 984, 997, 998, 999; Troxell vs. Del. Lack. & West, R.R., 227 U. S. 434, 33 S. Ct. 274, 57 L. Ed. 586."

When the Referee found that Mike Lyvers as an individual had no title to the property, it was then the duty of the referee either to order a sale made by the trustee of

all right, title and interest which the trustee in bankruptcy had in and to the property, or if it had developed that the Mike Lyvers Syndicate had an adverse title, to order the trustee in bankruptcy to bring a plenary action against Mike Lyvers Syndicate.

In *May v. Henderson, 268 U. S. 111, 116,* the Court said:

> "The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. Mueller vs. Nugent, 184 U. S. 1; Schweer vs. Brown, 195 U. S. 171; Hebert vs. Crawford, 228 U. S. 204; Re Ellis Bros. Printing Company, 156 Fed. 430."

And again,

> "It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court."

In the case of *Plymouth County Trust Co. v. MacDonald, 53 Fed. (2d) 827, 829,* the Court said:

> "That summary proceedings are not proper to recover possession of property formerly of the bankrupt, and held by a third party under a substantial claim of right, was conclusively established in Louisville Trust Co. v. Comingor, supra. The right of a defendant to insist that proceedings against him to recover such property alleged to have been conveyed as a preference be brought by plenary suit is too well settled to require additional citations, but in addition to the cases above cited, see Babbitt vs. Dutcher, 216 U. S. 102, 113, 30 S. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Lynch v. Roberson

(C.C.A.) 287 F. 433, 436; In re Vallozza (D.C.) 225 F. 334. The qualification suggested in Harrison, Trustee, v. Chamberlin, supra, and in the cases therein cited, that a defendant may consent to the determination of such issues in summary proceedings before a District Court sitting in bankruptcy, contemplates merely a waiver of the form of the proceedings and not a consent conferring jurisdiction, since a District Court under the sections above referred to has jurisdiction to determine the issue between the parties. We think the District Court misapplied the consent clause in section 23b, 11 USCA Sec. 46(b), which permits suits by a trustee, other than those mentioned in sections 60b, 67e and 70e of the act, 11 USCA Secs. 96(b), 107(e), 110(e) to be brought in a District Court only by consent of the defendant, unless the District Court would have had jurisdiction of an action by the bankrupt if bankruptcy proceedings had not been instituted. Bardes v. Hawarden First Nat. Bank, 178 U. S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175. The consent of a defendant conferring jurisdiction under this section has no application to suits by a trustee to recover a preference, or property conveyed in fraud of creditors. Jurisdiction in such cases is expressly vested under the sections above referred to concurrently in 'courts of bankruptcy' and in any state court which would have had jurisdiction in case bankruptcy had not intervened. Courts of bankruptcy, under section 1 (8) of the act, 11 USCA Sec. 1 (8), include the District Courts of the United States, but not referees in bankruptcy.

"Again, contrary to a ruling by the District Judge, the word 'courts,' as used in section 23b, is there used in a broader sense than in other parts of the act; since in this section it includes both state and federal courts, and originally included circuit courts. Bardes v. Hawarden First Nat. Bank,

supra, 178 U. S. page 536, 20 S. Ct. 1000, 44 L. Ed. 1175. It obviously does not in this connection include a referee, Weidhorn v. Levy, *supra*, as it may in other parts of the act under section 1 (7), 11 USCA Sec. 1 (7)."

The title papers under which Mike Lyvers Syndicate held were recorded in Union County Arkansas in 1923,—one April 28, 1923 (R. 28), and one August 10, 1923 (R. 30).

It is a principle of law that has never been disputed that, as said in *Murphy v. Suir, 16 Fed. (2) 269:*

"In the absence of proof to the contrary, the presumption of the law is that possession follows, legal title."

The Circuit Court of Appeals in the first appeal, speaking of the trusteeship, said of Mike Lyvers:

"It is fundamental that he was in duty bound to act for the promotion of their interests, 26 R.C.L. p. 1289, 39 C. J. 348, 349, 350. The execution of the quitclaim deed of this property viewed as a voluntary act without consideration was therefore made without authority and was a plain breach of the trust. This being so, we find no occasion to determine whether the bill sufficiently alleges coercion or duress on the part of the bankruptcy trustee in obtaining the deed."

And again,

"The purchaser is charged with notice of every matter appearing in the deeds forming an essential link in his chain of title and those of which he would have learned by due inquiry, including a

trust such as is disclosed by the deed of the trustee of the Mike Lyvers Syndicate. 39 C. J. 1713, 1714, 1715; Simmons Creek Coal Company vs. Doran, 142 U. S. 417, 437; 26 R.C.L. 180. Inquiry by the petroleum corporation would have readily developed the pertinent facts that the order of the referee was not a direction to the trustee to make the deed and that by the declaration of trust recorded February 22, 1923, the execution of the quitclaim deed was a breach of the trust."

35 Fed. (2) 464.

In *Union Pacific Railroad Company vs. Durant, 96 U. S. 576*, the Court held that a trustee could not make a binding admission against his trust nor deny the title of the *cestuis que trusts.*

In this connection we call attention to the affidavit made by Mike Lyvers as to why he executed the quitclaim deed. (Defendant's Exhibit-D, R. 72):

In *Robertson v. Frank Bros. Co., 132 U. S. 17*, the Court said:

"When the duress has been exerted by one clothed with official authority or exercising a public employment less evidence of compulsion or pressure is required." (p. 23).

In *Maxwell v. Griswold, 10 Howard 242*, the Court said that men could be,

"coerced to do the act in order to escape a greater evil."

In *Louisville Trust Company v. Cominger, 184 U. S. 18*, the Court said:

"We are of the opinion that even if Cominger could have consented to be pursued in this

manner he did not so consent. The district court entered a peremptory order that he should pay over, disobedience of which order was punishable by committment."

In *Chicago, Rock Island & Pacific R. R. Co. v. Schenkel, 270 U. S. 611*, the Court said:

"Identity of parties is not a mere matter of form but of substance; parties nominally the same will be in legal effect different." (p. 620).

In *Troxell v. Del. Lack. & West. R. R. Co., 227 U. S. 434*, the Court said:

"Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. Brown vs. Fletcher, 210 U. S. 82; Ingersoll vs. Coram, 211 U. S. 335."

The Circuit Court of Appeals in the second trial found there was a merger of the two syndicates,—the Morris Syndicate and the Mike Lyvers Syndicate. There can be no merger except under forms of law. See *Central Railroad & Banking Company v. Georgia, 92 U. S. (2 Otto) 665, 670; Southwestern Railroad Company v. Georgia, 92 U. S. (2 Otto) 676; Atlantic & Gulf Railroad Company v. Georgia, 98 U. S. (8 Otto) 359, 362.* The evidence in this case shows that all the time the two syndicates were separate and distinct, and whatever payments were made by the Morris Syndicate on behalf of the Mike Lyvers Syndicate were repaid by the Mike Lyvers Syndicate (R. 188, 191).

The very fact that this suit is instituted by the Mike Lyvers Syndicate without any question being raised

as to the existence of the Mike Lyvers Syndicate is in itself an answer to the argument concerning merger.

The consideration of the entire case answers the argument that the equities prevailed in favor of the defendant, because the only possible contention that there were any equities in favor of the defendant would arise from the fact that the defendant was an innocent purchaser for value or was misled by the action of the Mike Lyvers Syndicate. That it was not an innocent purchaser for value was held by the Circuit Court of Appeals for the Eighth Circuit on a simple consideration of the exhibits attached to the bill of complaint, and the Court said:

> "We hold the bill amply alleged notice to the fuel corporation. It was in no sense an innocent purchaser of the property."

We have shown in the statement of facts that the record title was in Mike Lyvers Syndicate; that Jeff Davis, the attorney for the Natural Gas & Fuel Corporation, which was the first defendant in this suit, had been attorney for the Natural Gas & Petroleum Corporation which had been the purchaser, and which was the same corporation under another name as was the first defendant, and the last defendant was represented in this case by the same Jeff Davis, and was substituted at its own request. The knowled e of the attorney is further shown by the fact that he required the second deed made by Mike Lyvers to H. M. Barney Trustee (R. 150, 151, 181).

The Circuit Court of Appeals ignored the district court's finding in favor of defendant on *res adjudicata* as to the Zug petition. The record shows this petition was

addressed to the Referee in Bankruptcy and was filed on March 18th, answered on March 18th, and decided by the Referee on March 18, 1925 (R. 62, 73, 82). The Referee had lost jurisdiction on approval of the contract on January 23, 1925, and the deed to the property had been passed March 2. Even the ten days for applying to the district court had expired. The question of laches decided by the trial court did not appeal to the Circuit Court of Appeals, the Court saying:

> "We have doubt as to whether it could be applied in this case where delays were to a large extent by a faithless trustee failing to take action to correct his own wrongful conduct. Willard vs. Campbell, 248 Pac. 219." (R. 206).

The Supreme Court of the United States, in *Crary v. Dye, 208 U. S. 515*, considered a case not nearly so strong as this case, and held that equitable estoppel did not apply therein. In the case of *Ullman v. Clark, 75 Fed. 868*, a case cited by *Hughes Federal Practice, Vol. 7, Sec. 201*, by *Foster's Federal Procedure, Vol. 1, p. 145* and by *Corpus Juris, Vol. 21, p. 232*, the Court said:

> "It seems to me that the plaintiffs could more properly impute laches to the defendants of failing to take notice of their claim before they undertook to develop the land. The defendants in this action have been guilty of inordinate haste and have not exercised ordinary prudence nor sound discretion when they, in the face of the notices that were served of the claim that was asserted publicly by the plaintiff to these lands, went on in defiance of those notices and commenced their mining operations."

The amended bill of complaint filed by the plaintiff herein (R. 46) shows the reasons for the delay on the part of the plaintiff herein, and testimony substantiating the allegations is to be found in the record, pages 127 to 129. There was no dispute on this or in any other testimony anywhere in the record. For the convenience of the Court we have attached as an appendix the opinion of the Circuit Court of Appeals on the first appeal.

We respectfully submit that the application for certiorari should be allowed, and thereafter the decision should be rendered by this Honorable Court reversing the decree of the appellate court below.

Respectfully submitted,

FRANK J. LOONEY,
JUDSON M. GRIMMET,
YANDELL BOATNER,
Attorneys for John H. Page, Trustee,
Petitioner.

APPENDIX

PAGE ET AL. v. NATURAL GAS & FUEL CO.

Circuit Court of Appeals, Eighth Circuit

October 7, 1929

(Opinion of the Court on the first appeal, 35 Fed. [2] 462)

"Cotteral, Circuit Judge. The appellants, John H. Page, successor to Mike Lyvers, trustee for Mike Lyvers Syndicate, and that syndicate, filed their bill against the Natural Gas & Fuel Corporation, on December 20, 1927, in a state court seeking a decree to the effect that appellant trustee is the owner of the north half of a mineral lease upon a tract of 40 acres, that the lease be conveyed to them by the defendant engaged in operating it, and that the defendant account for the oil and gas produced therefrom. The suit was removed to the federal court, where it was dismissed on motion of the defendant for failure to set out a cause of action, and from that decree the plaintiffs have appealed.

"In substance, the bill alleged that on February 23, 1923, the Mike Lyvers Syndicate was organized pursuant to the laws of Arkansas as a common-law trust, for the benefit of certificate holders who paid for their interests the amount of $200,000; that the declaration was duly filed for record on February 22, 1923, in Union County, Ark.; that the syndicate through its trustee acquired the W. ½ of the N. W. ¼ of the N. W. ¼ of Section 9, township 16 S, range 15 W., in that county, that in the bankruptcy proceeding of Morris Guaranteed Gusher Syndicate, No. 3, Mike Lyvers personally intervened, claiming ownership of the north half of the lease, with the result that the decree of the referee was adverse to him, and was that he

should convey the property to the bankruptcy trustee by quitclaim deed, and the title to it was vested in the said trustee, and that decree was affirmed on review by the District Court; that he executed such deed in the belief it was in accordance with the order of the court, at the instance and direction of the trustee, who prepared the deed, as the trustee for the Mike Lyvers Syndicate, the real owner of the property, without right, power, or authority; that the lease was sold by the bankruptcy trustee to the Natural Gas & Petroleum Corporation (called the petroleum corporation), which at the time was fully advised that the property belonged to the Mike Lyvers Syndicate, a trust estate; that Mike Lyvers has signed other instruments, at the instance of the bankruptcy trustee, corrective of errors in description and affecting the interests of the syndicate in the lease; that the defendant and appellee, the Natural Gas & Fuel Corporation (called the fuel corporation), took possession of the lease under claim of ownership, by transfer, and has produced therefrom and converted to its use large quantities of oil, in excess of $500,000, and continues therein, without accounting to plaintiff and without claim thereto; that the petroleum corporation and the fuel corporation had knowledge of the above facts because Jeff Davis was fully aware of them, being their attorney at the time of both transfers to those companies; that the claim of appellee is unfounded, and is a cloud on plaintiff's title; that the stock in both companies is owned by the same parties, and they are controlled by the same officers; that the latter company took title to said property with full knowledge of all things imputed to the former company; and that the plaintiff is without a complete and adequate remedy at law.

"Copies of the declaration of trust, the proceedings in bankruptcy, the quitclaim deed, and other exhibits are attached to the bill.

"In ruling on the motion to dismiss the bill, the District Judge reviewed the history of the case. He noted the quitclaim deed was made in three capacities—as an individual, trustee for the Mike Lyvers Syndicate and trustee; that the claim of mistaken belief inducing the quitclaim deed was contrary to Lyvers' petition for review and the deed itself; that there was no allegation of deception or coercion upon him, or want of consideration to the bankruptcy trustee from his purchaser, or to it from its grantee; that the notice to Jeff Davis as attorney was without definite averment of facts, or while acting for them within the scope of his authority; and for these reasons the bill was dismissed.

"The appeal presents four main questions: (1) Whether the order of the referee upon Mike Lyvers as an individual to execute the deed bound him to do that as trustee of the syndicate; (2) whether his deed as trustee conveyed the title to the lease; (3) whether the defendant, the fuel corporation, was an innocent purchaser of the lease; and (4) whether the plaintiffs were guilty of laches, barring this suit. We are constrained to hold that the first three questions must be answered in the negative, for sound and sufficient reasons. The last requires no absolute answer, in view of a proposed amendment to the bill.

"1. The intervention in the bankruptcy proceeding was made solely by Mike Lyvers, as an individual, representing that the bankruptcy trustee had taken possession

of his property, consisting of leases, including the 40 acres in dispute, requesting that the producing property be turned back to him and that the trustee sell none of the property. The referee found that the property was claimed by Lyvers and another, one Morris, was purchased with funds derived from the sale of units of the bankrupt's trust estate, was taken in their names and the name of Mike Lyvers, trustee, and thus handled for their convenience, the funds were commingled and hard to trace, the interveners failed to testify, but appeared by attorneys and cross-examined the witnesses. The referee thereupon ordered that the interventions of Lyvers and Morris be denied, that the title to the property be vested in the bankruptcy trustee, and that the interveners execute conveyances of the legal title to the property to said trustee. On review, the District Judge found that the trustee had filed a petition for a summary order requiring the conveyances; that thereafter Lyvers moved to dismiss his intervention, and the motion was denied; that the referee had found the property belonged to the estate; that the only question was one of jurisdiction to make the order, and it was sustained. The order of the referee requiring the quitclaim deed by Lyvers was affirmed.

"We do not inquire collaterally into the merits of these proceedings, passing the serious contention that the referee had no jurisdiction to make the summary order on Lyvers. See May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870; Harrison v. Chamberlin, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897. Aside from that, it is clear that the order on him as an individual had no force whatever upon him as trustee of the Mike Lyvers Syndicate.

It was not an adjudication against him as trustee, and does not estop the plaintiff, as successor trustee, to maintain this bill. 34 C. J. 984, 997, 998, 999; Troxell v. Del., Lack. & West. R. R., 227 U. S. 434, 33 S. Ct. 274, 57 L. Ed. 586.

"2. The next question arising from the execution of the quitclaim deed calls for some notice of the declaration of trust. It is prefaced by a recital that Mike Lyvers, as trustee, being about to take title to certain oil and gas leases, declares that he and his heirs, successors, administrators, and executors shall hold said leases and all other property that may be transferred to him as trustee upon the trusts therein set forth, for the benefit of the owners of certificates of interest. This is followed by some twenty articles defining the powers of the trustee and the rights of the beneficiaries, to whom the certificates were to issue for the consideration to be paid to the trustee of $10, or multiples thereof, entitling them to the benefits of the trust estate. The trust was to be known as Mike Lyvers Syndicate, with Mike Lyvers as trustee, holding in his own name the legal title to the corpus of the trust, possessing the sole power of selling, mortgaging and incumbering the property, in any manner or form, delegating the same, in record form, until superseded, and with the sole right to resign and power to name his successor, with the same powers. Alienation of or liens upon the property were to work a revocation of their estate and be paramount thereto, their interest attaching to the proceeds to be undivided and inure to their heirs and assigns, their rights being confined to income distributable by the trustee. The purpose of the trust was to buy and hold oil and

gas leases, drill upon and operate them, refine the product, and barter, sell, and exchange such property. The trustee was authorized to pay salaries and expenses, and terminate the trust by merger or reorganization, etc.

"Article XIV provides as follows:

> 'Sec. 1. The trustee may at all times, for value, sell or otherwise dispose of equitable estate in the corpus, as in these articles provided, to such extent as in his discretion he may see fit, and may close the sales of same at pleasure, and the proceeds from the sale of such equitable estate in the corpus shall accrue and inure to the trustee fund by him to be expended in his discretion for promoting, procuring and effecting the purpose of this trust.'

"While the sole power of alienating the property was thus vested in the trustee, it did not authorize him to donate it to others, or sacrifice it in a manner contrary to his fiduciary obligation to the *cestui que trustent*, or dispose of it otherwise than for their benefit. A fair construction of the articles is that the purpose was to enable him to act according to his own discretion and judgment, but in keeping with those obligations and in good faith in the discharge of his trust. It is fundamental that he was in duty bound to act for the promotion of their interests. 26 R. C. L. p. 1289; 39 C. J. 348, 349, 350. The execution of the quitclaim deed of this property, viewed as a voluntary act, without consideration, was therefore made without authority, and was a plain breach of the obligations of the trust. This being so, we find no occasion to determine whether the bill sufficiently alleges coercion or duress on the part of the bankruptcy trustee in obtaining the deed.

"The petroleum corporation derived no title to the property at the sale of the bankruptcy trustee, as he was vested by his appointment only with the title of the bankrupt, the Morris Syndicate (section 110, title 11, U. S. Code, 11 USCA Sec. 110), and the order was ineffective to vest in the trustee the title of the absent party, the trustee of the Lyvers Syndicate. That company has no claim to title except through the quitclaim deed; and that instrument, for the reasons stated, conveyed no title.

"3. A purchaser is charged with notice of every matter appearing in the deeds forming an essential link in his chain of title, and those of which he would have learned by due inquiry, including a trust, such as is disclosed by the deed of the trustee of the Mike Lyvers Syndicate. 39 C. J. 1713, 1714, 1715; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 12 S. Ct. 239, 35 L. Ed. 1063; 26 R. C. L. 1280. Inquiry by the petroleum corporation would have readily developed the pertinent facts that the order of the referee was not a direction to the trustee to make the deed, and that by the declaration of trust, recorded February 22, 1923, the execution of the quitclaim deed was a breach of the trust. The defendant, the fuel corporation, was in no better position, as before it obtained the assignment of the lease on March 2, 1925, the quitclaim forming a chain in its title had been theretofore recorded on November 25, 1924. But, aside from constructive notice, the bill alleged that the petroleum corporation was fully advised that the property belonged to the Lyvers Syndicate, there was identity of the stockholders and officers of the two corporations, and further the fuel corporation took title with full knowledge of all things im-

puted to the petroleum corporation. We hold the bill amply alleged notice to the fuel corporation. It was in no sense an innocent purchaser of the property.

"4. The defense of laches is dependent on the fact that the quitclaim deed was dated October 13, 1924, the conveyance of the bankruptcy trustee to the petroleum corporation was made on March 2, 1925, and this suit was brought on December 20, 1927, summons of that date being served on January 4, 1928. As counsel assert, relief will be denied if the bill discloses laches in bringing suit. Hays v. Port of Seattle, 251 U. S. 233, 40 S. St. 125, 64 L. Ed. 243. It must be conceded, the authorities call for diligence in seeking relief where there are sufficient circumstances connected with the development of mineral leases. Without referring to the cases, our present view is that plaintiff's bill is not open to this objection, as it alleges no more than that the defendant has profited by producing large quantities of oil from the leases, and will continue to do so; and there is no averment of exploration, development, or outlays by the defendant, or of change in the value of the property.

"But we refrain from finally deciding the question, as the plaintiffs have justifiably asked leave of this court to amend the bill to meet this objection to it. It is true they elected to stand on the bill, and this would ordinarily limit them to its allegations. Security Sav. Ass'n. v. Buchanan (C.C.A.) 66 F. 799; Investor's Guaranty Corp. v. Luikart (C.C.A.) 5 F. (2d) 793. But we consider that the objection was not expressly set out in the motion to dismiss the bill, the dismissal was not based upon it, counsel

for appellants advise us, as opposing counsel admit, it was not presented to the District Court, and they assert they would have there amended the bill had this been done. They claim surprise it is raised on appeal, and for this reason they have presented to us the motion to amend. Their election to stand on the bill should not therefore conclude them. In any event, the appellee is not entitled to an affirmance of the decree in this case on the ground of laches.

"This court has the power to allow an amendment even on appeal in the interest of justice. Jones v. Meehan, 175 U. S. 1, 29, 20 S. Ct. 1, 44 L. Ed. 49; Wiggins Ferry Co. v. Ohio & Miss. Ry. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. Ed. 1055. It may be done where the facts appear in the record, the practice, however, being to remit the question to the trial court. Norton v. Larney, 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413. The proposed amendment will be properly allowed by the District Court; and, if made, the question of laches will be for determination by that court. Otherwise, as we conclude, the bill states sufficient facts as a basis for relief.

"The decree of the District Court is therefore reversed, with direction to allow the plaintiffs to amend their bill, if so advised within a reasonable time, and for further proceedings consistent with this opinion.

"Reversed."